No. 85200-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DANA CLAUSEN,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

BRIEF OF INLANDBOATMEN'S UNION OF THE PACIFIC AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

80637

David W. Robertson
TSBA #17053500; LSBA #11068
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1339
Attorney for Inlandboatmen's
Union of the Pacific, Amicus Curiae

Lincoln Sieler, WSBA #20774
Friedman Rubin
601 Union St., Ste. 3100
Seattle, WA 98101-1374
(206) 576-6905
Attorney for Inlandboatmen's
Union of the Pacific, Amicus Curiae

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

With headquarters in Seattle, the 4000-member Inlandboatmen's Union of the Pacific ("IBU") is among the nation's largest maritime labor unions. IBU's members work on ferries, tugs, and other commercial vessels. Their medical care for work-related injury and illness is governed by the maritime law of maintenance and cure. As many of these workers live in Washington and work upon Washington's waters, this case will affect their maritime rights and remedies. IBU submits this amicus brief in support of Respondent, urging the affirmance of the decision below.

II. STATEMENT OF THE CASE

Amicus adopts Respondent's Statement of the Case.

III. ARGUMENT

A. The Procedure Used by the Trial Court to Determine the Amount of the Attorney Fees Award Correctly Followed Federal Maritime and Washington State Law and Practice.

Clausen's brief demonstrates that Icicle waived its procedural argument. Moreover, Icicle's attack on the trial court's procedure is wholly unconvincing. Judge Hill followed ***precisely*** the procedure used by virtually all federal admiralty courts to assess attorney fees in maintenance and cure cases. The procedure used below is also fully compliant with Washington's Civil Rule 54(d)(2). Icicle's procedural attack has no warrant in federal or state law.

1. **The Court Below Carefully Followed Federal Maritime Law.**

In *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995), *abrogated on other grounds* in *Atlantic Sounding Co. v. Townsend,* ___ U.S. ___, 129 S. Ct. 2561, 2566, 174 L.Ed.2d 382 (2009), the Ninth Circuit affirmed an award of attorney fees against a seaman's employer for "willfully and arbitrarily refus[ing] to pay maintenance and cure" (57 F.3d. at 1501). The jury made the willful-and-arbitrary finding, and the trial judge thereafter awarded attorney fees (*id.* at 1497). Affirming the fee award, the Ninth Circuit held that the trial court did not "abuse[] its discretion in fixing the amount" (*id.* at 1501). There was no question but that the procedure—whereby the jury made the requisite blameworthiness finding and the judge then determined the amount of the fee—was standard and correct.

The correctness of the *Glynn* procedure is confirmed by *Kopczynski v. The Jacqueline*, 742 F. 2d 555 (9th Cir. 1984), and by Ninth Circuit Pattern Jury Instruction No. 7.12. In *Kopczynski*, the jury answered the willful-and-arbitrary question no, and the Ninth Circuit affirmed the trial judge's consequent decision not to award attorney fees (742 F.2d at 559). The Pattern Jury Instruction puts the willful-and-arbitrary issue to the jury, and the explanatory Comment states: "If the

jury finds that the defendant willfully and arbitrarily failed to pay maintenance or cure, the plaintiff will be entitled to reasonable attorneys' fees as determined by the court."

The procedure used by the court below meticulously replicated the procedure used in *Glynn* and called for by *Kopczynski* and the Pattern Jury Instruction. Icicle presents not even a hint that the courts in the Ninth Circuit ever deviate from that procedure. The fact that Judge Hill carefully followed uniform circuit-wide procedure substantially refutes Icicle's charge that she violated federal maritime law. Moreover, the Ninth Circuit is in accord with the Second, Third, and Fourth Circuits on this matter. *See Incandela v. American Dredging Co.*, 659 F.2d 11, 15 (2d Cir. 1981); *Kopacz v. Delaware River and Bay Authority*, 248 Fed. Appx. 319, 321-22 (3d Cir. 2007); *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 173 (3d Cir. 1995) (en banc); *Williams v. Kingston Shipping Co.*, 925 F.2d 721, 722-23, 725-26 (4th Cir. 1991). The decision of a Fifth Circuit panel in *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984), stands as a lonely outlier.

2. Icicle's Argument Distorts Washington's Civil Rule 54(d)(2).

The linchpin of Icicle's attack on Judge Hill's procedure is the assertion that "where attorney fees are an element of damages, failure to

present evidence to the jury for determination of a reasonable amount precludes recovery of fees" (Icicle's opening brief at 13). Icicle says this over and over, repeatedly insisting that all that matters is whether the fee award is properly classified as an element of damages. And Icicle maintains that this proposition holds true under both federal maritime law and Washington state law.[1]

Section A-1 above shows that Icicle is wrong about federal maritime law. And Icicle is equally wrong about Washington law. The Washington-law inquiry begins with the language of Civil Rule 54(d)(2):

> Claims for attorneys' fees and expenses ...shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages ***to be proved at trial.*** .... [Emphasis supplied.]

Icicle resolutely ignores the above-emphasized phrase. CR 54(d)(2) does not say (as Icicle would have it) that an attorney fee cannot be determined by motion whenever the fee is regarded as damages by the applicable substantive law. Rather, it says that the amount of an attorney fee is

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[1] Icicle's opening brief, p. 13. The claim runs like a mantra through Icicle's briefs. (In the quotations below, all emphasis is supplied.) *See, e.g.*, opening brief at 9 ("Under federal maritime law, an award of attorney fees for failure to pay maintenance and cure is an element of "***damages***, and is ***therefore*** a question of fact that must be decided by the jury."); *id.* at 13 ("Washington courts have similarly recognized as a matter of substantive law that where attorney fees are an element of ***damages***, failure to present evidence to the jury for determination of a reasonable amount ***precludes*** recovery of fees."); Reply brief at 8 ("[F]or purposes of determining whether the question of attorney fees in a maintenance and cure case must go to the jury, it is not important whether *Vaughan* fees are compensatory or punitive; it ***matters only that they are an element of damages***").

appropriately determined by motion unless substantive law establishes that the fee is "damages to be proved at trial."[2]

We will see in Section A-3 *infra* that in handling attorney fee awards in areas of Washington law that are closely analogous to maintenance and cure, Washington's courts follow a procedure that is identical to the federal courts' procedure for determining maintenance and cure fee awards. Nothing in CR 54(d)(2) impedes this procedure. CR 54(d)(2)'s phrase "to be proved at trial" comes close to speaking for itself. And the phrase gains additional clarity when CR 54(d)(2) is compared with the corresponding language of its federal counterpart, Fed. R. Civ. P. 54(d)(2)(A).[3]

Until fairly recently, the relevant language of the two provisions was identical. *See Bender v. Freed*, 436 F.3d 747, 750 (7th Cir. 2006), quoting Fed. R. Civ. P. 54(d)(2)(A) as follows (emphasis by *Bender* court):

> Claims for attorneys' fees and related nontaxable expenses shall be made by motion *unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.*

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[2] Clausen's brief at 20-21 cites three cases demonstrating that the only attorney-fees category required by Washington substantive law to be treated as damages to be proved at trial are fee expenditures necessitated by a defendant's wrongful "exposure of a party to litigation with others."

[3] Icicle's opening brief at 14 states that the language and jurisprudence of Fed. R. Civ. P. 54(d)(2)(A) are "instructive" on the meaning of CR 54(d)(2).

The *Bender* court held that the emphasized requirement (for taking a fee-award issue out of motion practice) was not satisfied by establishing that the applicable substantive law treated the attorney fee as "'substantive' and 'not costs.'" 436 F.3d at 750. Instead, Fed. R. Civ. P. 54(d)(2)(A) subjects all attorney-fee issues to motion practice except when the substantive law establishing the entitlement to the attorney fee ***requires*** the amount of the fee "to be proved at trial." *Id.*

The correctness of the *Bender* reading of Fed. R. Civ. P. 54(d)(2)(A) has been confirmed by the 2007 amendment to the rule, which now reads:

> A claim for attorney's fees and related nontaxable expenses must be made by motion ***unless the substantive law requires those fees to be proved at trial*** as an element of damages. [Emphasis supplied.]

The Advisory Committee Notes for the 2007 Amendments state that the change to Rule 54(d)(2)(A)'s wording was "stylistic only;" no change in meaning was expressed or implied. This shows that the federal rule in its present and former language calls for setting the amount of attorney fees by motion practice unless substantive law ***requires*** submission of the issue to the trier of fact as part of the trial on the merits. Icicle has seemingly conceded (*see* supra note 3) that CR 54(d)(2) has the same meaning as the federal rule. And Icicle has identified nothing in federal maritime or

Washington state substantive law that requires the amount of a maintenance-and-cure attorney fee to be determined by the trier of fact during the merits trial.

3. Washington Law Uses CR 54(d)(2) Motion Practice to Make Fee Awards That Are Closely Analogous to the Award Here.

The most obvious state-law analogy to maintenance-and-cure attorney fees are Washington's provisions awarding attorney fees in successful actions to enforce workers' rights to their wages and similar benefits. In *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 409, 24 P. 3d 447 (2001), *review granted*, 145 Wn.2d 1015 (2002), the court enforced "the Washington remedy for willful withholding of fishermen's wages" (RCW 49.52.070). The jury awarded wages to the plaintiffs. 106 Wn. App. at 410. In a subsequent proceeding—to all appearances, a proceeding under CR 54(d)(2)—the trial judge awarded attorney fees. *Id.* The Court of Appeals affirmed the award. *Id.* at 426-27. No one questioned the procedure. In other cases of attorney fee awards under worker-protection remedies, Washington trial courts have set the fee award using CR 54(d)(2) procedure, and no appellate court has ever questioned the procedure.[4] Seemingly, the use of CR 54(d)(2) motion

[4] *See Bunch v. King County Department of Youth Services*, 155 Wn.2d 165, 169-70, 184 n.10, 116 P.3d 381 (2005) (jury award of damages in employment discrimination case, followed by trial judge's award of attorney fees under RCW

practice to set attorney fees is standard throughout the broad field of worker-protection remedies.[5]

The next most obvious Washington-law analogy to maintenance-and-cure attorney fees are fees to successful plaintiffs in child support and similar proceedings.[6] Here, too, the use of CR 54(d)(2) motion practice to set attorney fee awards seems to be standard practice.[7]

A third close Washington-law analogy to maintenance-and-cure attorney fees is the doctrine of *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991), whereby an insurer owes attorney fees whenever its insured is compelled "to assume the burden of legal action, to obtain the full benefit of his insurance

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49.60.030(2); this Court affirmed the fee award); *Bally v. Ocean Transportation Services*, 136 Wn. App. 1052, 2007 WL 214573 at *1-2, 9 (2007) (unpublished opinion) (affirming fee award under RCW 49.52.070—the same statute applied in *Paul*—made by trial judge after jury verdict in what looks to have been a CR 54(d)(2) motion proceeding). Cf. *Corey v. Pierce County*, 154 Wn. App. 752, 773, 225 P.3d 367 (2010) (stating that fee awards in actions for "wages or salary owed" under RCW 49.48.030—which states that the fee award is to be "in an amount determined by the court"—fall under CR 54(d)(2)).

[5] Cf. RCW 49.12.150 (attorney fees in actions to enforce minimum wage law are "to be fixed by the court"); RCW 60.76.040 (in actions concerning employers' contributions to employee benefit plans, "[t]he court may allow, as part of the costs of the action, ... a reasonable attorney's fee....").

[6] The analogy is very close. *See Farrell v. United States*, 336 U.S. 511, 516, 69 S. Ct. 707, 93 L.Ed. 850 (1949) (employer must treat injured seaman "much as a parent would a child"); *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (maintenance and cure law is "parental law").

[7] *See* RCW 26.18.160 (prevailing party in child support action "is entitled to a recovery of costs, including an award for reasonable attorney fees."); *In re Rodriguez*, 159 Wn. App. 1047, 2011 WL 294480 at *1 (2011) (unpublished opinion) (stating that such fees are to be sought by a CR 54(d)(2) motion).

contract." In *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 36, 904 P.2d 731 (1995), this Court explained that the basis for the *Olympic Steamship* doctrine is "the enhanced fiduciary obligation springing from an insurer-insured relationship." "Enhanced fiduciary obligation" is an apt way of describing the maintenance-and-cure duties of a seaman's employer.[8] It ought to follow that the *McGreevy* case is a good indicator of what the procedure for awarding attorney fees should be in maintenance and cure cases. And in *McGreevy*, the contemplated procedure appeared to be the assessment of the attorney fee in a post-judgment proceeding of the sort specified in CR 54(d)(2).[9]

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[8] *See Johnson v. Cenac Towing, Inc.*, 599 F. Supp. 2d 721, 727 (E.D. La. 2009) (developing at some length maintenance-and-cure law's "analogy to the law of insurance"). In her Order Denying Defendant's Motion to Amend Judgment, Judge Hill emphasized the insurance analogy. *See* Appendix A5.37, A5.41.

[9] The procedural aspects of *McGreevy* are detailed in the Court of Appeals opinion, *McGreevy v. Oregon Mutual Insurance Co.*, 74 Wn. App. 858, 860-63, 876 P.2d 463 (1994) and in this Court's opinion, 128 Wn.2d at 29-31. Involved in a policy-limits dispute with her insurer, McGreevy brought a declaratory action, which led to a jury trial and a subsequent arbitration proceeding, both of which culminated in McGreevy's favor. ***After*** the trial judge entered final judgment confirming the arbitration award and awarding damages, McGreevy sought attorney fees under the *Olympic Steamship* doctrine. *See* 128 Wn. 2d at 30 ("the trial court entered final judgment"); 74 Wn. App. at 863 (after entering judgment, the trial judge "refused a later request" for *Olympic Steamship* fees). By the logic of Icicle's argument, McGreevy would have been barred from seeking the fees post-judgment; she would have been required to seek them in the merits-determining proceeding before the jury or before the arbitrators. But when the Court of Appeals reversed the trial court's refusal to award *Olympic Steamship* fees, it gave no indication of any procedural irregularities and instead "***remanded [the case] to the trial court for an award of reasonable attorney fees and costs.***" 74 Wn. App. at 874 (emphasis supplied). This Court affirmed the Court of Appeals decision. 128 Wn.2d at 40.

Thus, Judge Hill seems to have been on completely sound ground. She followed the same procedure used by virtually all federal courts to set maintenance-and-cure attorney fees. And this was the same procedure used by Washington courts to set attorney fees in the areas of state law most closely analogous to maintenance and cure. Icicle's attack on Judge Hill's procedure is unwarranted and meritless.

4. Maintenance-and-Cure Attorney Fees Are Equity-Based.

"[W]hat courts do [sometimes] makes better sense than what they ... say."[10] The fact that the procedure adopted by Judge Hill exactly matched what the federal courts in maintenance and cure cases and the Washington courts in analogous state-law cases have uniformly ***done*** should alone be enough to validate her procedure.

And there is further support for Judge Hill's procedure in the fact that the maintenance-and-cure attorney fees remedy is based in major part on principles of equity. In the seminal case, the Supreme Court explicitly invoked equity as among its bases for recognizing the remedy's validity. *Vaughan v. Atkinson,* 369 U.S. 527, 530, 82 S. Ct. 997, 8 L.Ed.2d 88

[10] *In re Kinsman Transit Co.*, 338 F.2d 708, 725 (2d Cir. 1964).

(1962). In a line of subsequent cases, the Court has confirmed the substantial equitable ingredient.[11]

Washington's courts, too, have confirmed that maintenance-and-cure-based attorney fees are equity-based. The Court of Appeals said in *Paul* that "equity may warrant an award of attorney fees in admiralty cases," citing *Vaughan*. 106 Wn. App. 406, 426 & n.84, 24 P.3d 447. In *McGreevy*, this Court said the analogous *Olympic Steamship* attorney-fees remedy is based on "recognized grounds of equity" (128 Wn. 2d at 35, 904 P.2d at 735), including both the courts' inherent "equitable powers to award attorney fees" and the fact that "equity recognizes [an insurer's] enhanced fiduciary obligation." *Id.* at 37, 904 P.2d at 737.

The significance of the equity basis for maintenance-and-cure attorney fees is this: This Court held in *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 367, 617 P.2d 704, 709 (1980), that "trial court[s] [have] ***wide discretion*** in cases involving both legal and equitable issues, to allow a jury [trial] on some, none, or all issues presented [emphasis supplied]." The Ninth Circuit added in *United States v. Martinson*, 809 F.2d 1364,

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[11] *See* Clausen brief at 23 n.22. *See also Atlantic Sounding*, 129 S. Ct. at 2568-69, 2574 n.9; *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42, 63 S. Ct. 488, 87 L.Ed. 596 (1943); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371-72, 53 S. Ct. 173, 77 L.Ed. 368 (1932); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 279-80 n.4, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975) (Marshall, J., dissenting); *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1027-28 (2d Cir. 1979).

1367-68 (9th Cir. 1987), that "[w]here a court of equity assumes jurisdiction because the complaint requires equitable relief, the court has power to award damages incident to the complaint." It really seems impossible to conclude that Judge Hill has abused her "wide discretion" here.

B. Judge Hill Correctly Interpreted *Exxon Shipping v. Baker*.

Icicle invokes the 1:1 ratio (of punitive to compensatory damages) applied in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L.Ed.2d 570 (2008), to limit Exxon's punitive damages exposure for recklessly grounding the tanker vessel *Exxon Valdez*. However, Judge Hill was correct to determine that the ratio of punitive to compensatory damages in this case—2.79:1—was not disapproved by anything in *Exxon Shipping*.

1. *Exxon Shipping* Probably Does Not Apply to Maintenance and Cure Cases.

The Supreme Court said in *Atlantic Sounding*, 129 S. Ct. at 2574 n.11, that it was not called upon to decide whether "the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has [in *Exxon Shipping*] elsewhere imposed." The Court's wording includes two cues that the Court was inclined to think not. The most obvious is the word "elsewhere;" it signals that the *Atlantic*

Sounding Court regarded *Exxon Shipping* as addressing a different area of federal maritime law from the maintenance and cure area.

The second cue that the *Atlantic Sounding* Court was inclined against subjecting maintenance-and-cure punitive awards to a 1:1 ratio is the Court's tying the necessary-cap issue to the "size" of maintenance-and-cure punitive awards. The central concern of the *Exxon Shipping* Court was "the stark unpredictability of ... outlier cases subject[ing] defendants to punitive damages that dwarf the corresponding compensatories." 554 U.S. at 499-500.[12] The law of maintenance and cure has never been any part of that problem. There are apparently only nine reported cases in which U.S. courts have made or upheld punitive damage awards for withholding maintenance or cure. In two of these, the punitive awards were blended with compensatory damages such that the punitive amounts cannot be identified.[13] In five cases, the punitive damages were less than the compensatories.[14] The remaining two cases—

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[12] *See also* 554 U.S. at 501 (again defining the problem as "outlier punitive-damages awards"); *id.* at 502 (emphasizing "the unpredictability of high punitive awards"); *id.* at 504 ("unpredictable outliers"); *id.* at 506 (discussing the need for "eliminating unpredictable outlying punitive awards"); *id.* at 507 ("outlier punitive-damages awards").

[13] *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372 (5th Cir. 1981); *Martin v. G & A Limited*, 604 So.2d 1014 (La. App. 3d Cir. 1992).

[14] *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987) (compensatory damages $15,150, punitive award $5000); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1113 (5th Cir. 1984) (compensatory $420,016, punitive $11,550);

in which punitives exceeded compensatories—had ratios (punitive to compensatory) of 4.86:1 and 2.95:1.[15] By way of stark contrast, the "outlier" cases the *Exxon Shipping* Court was worried about had ratios such as 526:1, 500:1, 145:1, 96.8:1, and 90:1.[16]

There are additional signals in the *Exxon Shipping* opinion that the Court probably did not intend to subject maintenance and cure cases to the 1:1 ratio. The first is simply the number of times the Court emphasized that the 1:1 ratio was designed primarily for the unusual (in many respects[17]) case before it.[18] The second is the Court's overwhelming

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Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1049, 1053 (1st Cir. 1973) (compensatory $56,366, punitive $10,000); *Jordan v. Intercontinental Bulktank Corp.*, 621 So.2d 1141, 1147-48, 1158 (La. App. 1st Cir. 1993) (compensatory $544,759, punitive $500,000); *Porche v. Maritime Overseas Corp.*, 550 So.2d 278, 279-80 (La. App. 4th Cir. 1989) (compensatory $144,000, punitive $100,000).

[15] *Babbidge v. Crest Tankers, Inc.*, 1992 A.M.C. 2471, 1991 WL 432058 (D. Me. 1991) (compensatory $7200, punitive $35,000); *Hodges* v. *Keystone Shipping Co.*, 578 F. Supp. 620 (S.D. Tex. 1983) (compensatory $33,948, punitive $100,000).

[16] These were the ratios in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 125 L.Ed.2d 366 (1993), *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1991), *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003), *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L.Ed.2d 940 (2007), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 140 L.Ed.2d 674 (2001).

[17] For example, Exxon had already spent around $2.1 billion in cleanup efforts, at least $900 million toward restoring natural resources, over $303 million in voluntary settlements, and $125 million in fines and restitution. 554 U.S. at 479.

[18] *See* 554 U.S. at 476 (stating the issue presented as whether the $2.5 billion punitive award was "greater than maritime law should allow in the circumstances [of] this case," and stating that its holding is that "the award here" should be limited by the 1:1 ratio); *id.* at 481 (again stating the issue as "whether the punitive damages awarded against Exxon in this case were excessive"); *id.* at 510-11 (searching for an appropriate

concern with and emphasis on the field of tort law. The opinion is shot through with "tort" references. In contrast, it mentions contract cases just twice,[19] very much in passing, and property-law cases only once.[20] Moreover, the Court overtly signals its predominant focus on tort cases by setting forth various blameworthy-conduct descriptions and then stating: "These [blameworthiness] standards are from the torts context; different standards apply to other causes of action." 554 U.S. at 493 n.10.

Maintenance and cure law is not tort law. And it is not contract or property law either. It is "sui generis." *Clauson v. Smith*, 823 F.2d 660, 661 n.1 (1st Cir. 1987). "[The seaman's right [to maintenance and cure] was firmly established in the maritime law long before recognition of the distinction between tort and contract." *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42, 63 S. Ct. 488, 87 L.Ed. 596 (1943). It is "annexed by law to [the shipowner-seaman relation], and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 372, 53 S. Ct. 173, 77 L.Ed. 368 (1932).

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limit in "cases like this one," in "this particular type of case"); *id.* at 511-12 (emphasizing concerns for "the target here," *viz.* "this case of staggering [compensatory] damage inevitably provoking governmental enforcers to indict and any number of private parties to sue"); *id.* at 512-13 (multiple references to "cases like this one," to "such maritime cases").

[19] *See id.* at 500 n.16, 506.

[20] *See id.* at 500 n.16.

Maintenance and cure is thus pretty far afield from any of the *Exxon Shipping* Court's concerns. There is no indication in the opinion that the Court meant to impose any limits on maintenance and cure law, and plenty of signals to the contrary.

2. *Exxon Shipping* Indicates Two Exceptions to the 1:1 Ratio that Closely Fit Clausen's Case.

Even if maintenance and cure cases were held to be subject to ratio-based scrutiny, the *Exxon Shipping* methodology would diagnose no problems with the 2.79:1 punitive award here. For one thing, no one confronting the stark reality of Icicle's mistreatment of Dana Clausen[21] can doubt the plausibility of Judge Hill's repeated and emphatic characterization of Icicle's conduct as "the zenith of reprehensibility." Appendix A5.38, A5.49. In crucial contrast, Exxon's conduct was "squarely in the middle of a fault continuum." *In re Exxon Valdez*, 490 F.3d 1066, 1073, 1085 (9th Cir. 2007). The Supreme Court took pains to emphasize this aspect of its decision, stressing that it was in search of a limit for "cases with no earmarks of exceptional blameworthiness," 554

[21] This reality is summarized in Judge Hill's Order Denying Defendant's Motion to Amend Judgment, Appendix A5.40-A5.47, and set forth in somewhat greater detail in brief of respondent Clausen at 4-11, 14-15.

U.S. at 513;[22] that Exxon's conduct was no worse than "reckless," *id.* at 480; that recklessness ranks below intentional, malicious, and callous conduct on the blameworthiness scale, *id.* at 490, 493-94; and that its decision was focused on "cases like this one, where the tortious action was worse than negligent but less than malicious," *id.* at 510.

Even closer to the heart of the matter is Judge Hill's demonstration that Icicle's conduct "amount[ed] to intentional disregard for Mr. Clausen's health, and evidence[d] a plan to trade Mr. Clausen's health for corporate profits." Appendix A5.41. As Judge Hill was careful to note, the Supreme Court in *Exxon Shipping* said that "'malicious behavior' 'carried on for the purpose of increasing the tortfeasor's financial gain' is 'some of the most egregious conduct.'" Appendix A5.40, citing *Exxon Shipping*, 554 U.S. at 510. *See also* Appendix A5.45: "According to *Exxon*, willful and wanton conduct in the pursuit of profit is 'the most egregious conduct.'"

Throughout its *Exxon Shipping* opinion, the Supreme Court emphasized the high degree of blameworthiness of conduct such as an employer's trading a worker's health for corporate profits, repeatedly singling out cases "where conduct was motivated by financial gain and its

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[22] For telling emphasis on this feature of the *Exxon Shipping* decision, see the opinion of Chief Judge Royce Lamberth in *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 89-90 n.17 (D.D.C. 2010).

adverse consequences were known to the defendant" for special condemnation. 554 U.S. at 494, 510 n.24.[23] When the Supreme Court expressed special condemnation for cases "where defendant's wrongful conduct was motivated solely by unreasonable financial gain and the unreasonably dangerous nature of the conduct, together with the high likelihood of injury, was actually known by the managing agent, director, or other person responsible for making policy decisions on behalf of the defendant" (554 U.S. at 510 n.24), it was describing with apparent approval a Florida statute with a 4:1 (or $2 million if greater) limit on punitive damages in such cases. But it might well have been talking about Icicle's conduct in Dana Clausen's case.

C. Judge Hill Was Right to Classify Attorney Fees as Compensatory.

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 18 L.Ed.2d 475 (1967), the Supreme Court cited *Vaughan v. Atkinson* as having "held [that] an admiralty plaintiff may be

[23] *See also id.* at 494 ("Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability."); *id.* at 496 n.12 (indicating that "financial benefit derived by the defendant, in cases of intentional and malicious conduct" is especially blameworthy); *id.* at 510 n.24 (suggesting that a higher limit than 1:1 may well be justified "where defendant's conduct was motivated solely by unreasonable financial gain and the unreasonably dangerous nature of the conduct, together with the high likelihood of injury, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant"); *id.* at 512 (stating that "avarice" is worse than recklessness); *id.* at 513 (identifying "behavior driven primarily by desire for gain" as an "earmark[] of exceptional blameworthiness").

awarded counsel fees as an item of compensatory damages (not as a separate cost to be taxed)." *Vaughan* itself described the seaman's cause of action for compensatory damages when maintenance and cure are wrongfully withheld or delayed and then said: "It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." 369 U.S. at 531. And the Supreme Court has given multiple additional indications that attorney fees in cases like *Vaughan* are compensatory in nature.[24]

Turning to the federal Courts of Appeals: The Ninth Circuit has expressed doubt whether maintenance-and-cure attorney fees "should be regarded as 'punitive,'" and the Fifth Circuit has indicated that they are probably compensatory.[25] Respecting what it called "bad faith attorneys'

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[24] *Day v. Woodworth*, 13 How. (54 U.S.) 363, 371, 14 L.Ed. 181 (1851), specifically held that attorney fees "compensate the plaintiff" and cannot properly be treated as punitive damages. In *Exxon Shipping*, the Court cited *Day* with apparent approval as a seminal punitive damages case. 554 U.S. at 491. *See also id.* at 495 (seeming to question Connecticut cases classifying attorney fees generally as "punitive recovery"); *Alyeska*, 421 U.S. at 279 (Marshall, J., dissenting, citing *Vaughan* as exemplifying "the equity court's power to include attorneys' fees in the plaintiff's award when the defendant has unjustifiably put the plaintiff to the expense of litigation in order to obtain a benefit to which the latter was plainly entitled."); *Hutto v. Finney*, 437 U.S. 678, 689 n.14, 98 S. Ct. 2565, 57 L.Ed.2d 522 (1979) ("An equity court has the unquestioned power to award attorney's fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order. * * * The award vindicates judicial authority without resort to the more drastic sanctions available for contempt of court and makes the prevailing party whole for expenses caused by his opponent's obstinacy.").

[25] *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1504 (9th Cir. 1995); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1503 (5th Cir. 1995) (en banc). Both *Glynn* and *Guevara* were abrogated on other grounds in *Atlantic Sounding*, 129 S. Ct. at 2566.

fees," the Second Circuit in *Sierra Club v. United States Army Corps. of Engineers*, 776 F.2d 383, 389 (2d Cir. 1985), stated:

> We believe that an award of fees under the bad faith exception rests on different principles than does an award of punitive damages. Although the award of fees for bad faith has a punitive and deterrent flavor, the award serves a compensatory purpose.

In her Order Denying Defendant's Motion to Amend Judgment, Judge Hill cited two cases squarely holding that attorney fees should be placed on the compensatory side of the punitive-compensatory ratio (see Appendix A5.39-A.540), and she noted that Icicle "fails to cite any case" to the contrary (A5.38). Icicle still has not cited such a case.[26]

IV. CONCLUSION

The decision below should be affirmed.

DATED this 12 day of August, 2011.

Respectfully submitted,

David W. Robertson, TSBA #17053500
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1339
Attorney for Inlandboatmen's
Union of the Pacific, Amicus Curiae

[26] The *Atlantic Sounding* Court was addressing a completely different point when it cited *Vaughan* as supportive of the availability of punitive damages in maintenance and cure cases (*see* 129 S. Ct. at 2571), and it did not indicate that the award in *Vaughan was* punitive damages, but only that it had punitive aspects.

Lincoln Sieler, WSBA #20774
Friedman Rubin
601 Union St., Ste. 3100
Seattle, WA 98101-1374
(206) 576-6905
Attorney for Inlandboatmen's
Union of the Pacific, Amicus Curiae